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No. 09-1284

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In The
Supreme Court of the United States

LEONARD MCSHERRY,

Petitioner,

v.

CITY OF LONG BEACH, LONG BEACH POLICE DEPARTMENT, NORMAN TURLEY, and CARTHEL S. ROBERSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner was arrested and charged with kidnapping and raping a six-year old girl based on probable cause -- (a) he was repeatedly identified as the perpetrator by the victim, the victim's brother, and an adult neighbor, (b) he was a registered sex offender with a history of convictions and imprisonment for kidnapping and molesting young girls, and (c) a crime laboratory concluded that he was a possible donor of the involved semen. As the Court of Appeals below held, the determination of probable cause was not tainted by fabricated evidence or police misconduct, the prosecutor conducted an exhaustive independent investigation, and, under those circumstances, Petitioner has no claim against Respondents, a municipality, its police department, and two police officers. The Court of Appeals' decision below is consistent with, and is not contrary to, other Courts of Appeals' decisions. Should this Court grant certiorari to resolve a non-existent conflict of decisions of the Courts of Appeals?

2. Police officers are absolutely immune from liability for their trial testimony. There may be an exception to this absolute immunity where a plaintiff makes a malicious-prosecution-type claim and a police officer is the complaining witness. The Court of Appeals below held that the victim, not a Respondent police officer, was the complaining witness. In addition, any complaining-witness exception is irrelevant

QUESTIONS PRESENTED – Continued

where, as here, there is probable cause because probable cause independently bars any malicious-prosecution-type claim. The Court of Appeals' decision below is consistent with, and is not contrary to, other Courts of Appeals' decisions. Should this Court grant certiorari to resolve a non-existent conflict of decisions of the Courts of Appeals?

3. This Court in *Hartman v. Moore* held that a plaintiff must plead and prove the lack of probable cause in a retaliatory-prosecution case, where, in alleged retaliation for plaintiff's exercise of First Amendment rights, a person convinces a prosecutor to file charges against plaintiff. Since *Hartman*, the Courts of Appeals have held that *Hartman*'s probable-cause requirement applies to other kinds of cases, including claims based on alleged violations of other constitutional rights where a prosecutor has filed charges. The Court of Appeals' decision below is consistent with, and is not contrary to, other Courts of Appeals' decisions. Should this Court grant certiorari to resolve a non-existent conflict of decisions of the Courts of Appeals?

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STATEMENT OF THE CASE

Statement of Facts

This case involves the 1988 kidnapping and rape of Candice, a six-year-old girl, from a Naval base playground in Long Beach, California.

In 1988 Petitioner Leonard McSherry was a registered sex offender with a history of convictions for kidnapping and molesting young girls. In 1970 McSherry forcibly abducted and sexually molested a six-year-old girl and later pleaded guilty to felony child molestation. In 1975 McSherry was convicted of lewd and lascivious conduct towards an eight-year-old girl and served four years in state prison. In 1979 McSherry was convicted of kidnapping a fifteen-year-old girl and served six years before being paroled. In 1986 McSherry was convicted of a misdemeanor involving children and sentenced to county jail. McSherry's official record shows that he first registered as a sex offender in California with respect to children in 1971 and renewed that registration in 1985.

Although Candice's initial identification did not closely match McSherry, Candice later identified McSherry as the perpetrator five times (with persons other than police officers, including nurses and Naval investigators, always present) – two photo line-ups, a live line-up, the preliminary hearing, and the trial. She identified McSherry as the perpetrator because she in fact believed that McSherry had kidnapped and raped her. Candice's brother, who witnessed the

kidnapping, also identified McSherry. An adult neighbor also identified McSherry four times – a photo line-up, a live line-up, the preliminary hearing, and the trial. The Sheriff's crime laboratory concluded McSherry was a possible donor of the involved semen. On May 17, 1988 McSherry was arrested.

Prosecutor Ken Lamb reviewed all of the evidence, including the witnesses' identifications, the witnesses' statements, the officers' statements, the physical evidence, the crime laboratory results, and other corroborating evidence, to ensure there was a case against McSherry, to ensure the reports and line-ups were lawful and not suggestive, and to verify the police information.

The prosecutor personally interviewed Candice several times and was convinced that her descriptions and identifications were based on what she remembered, not on any coaching or outside influence. Based on his extensive experience with child victims of sexual assault, he believed that her emotional state indicated that it would have been virtually impossible for anyone to coach her on what to say. The prosecutor also personally interviewed Candice's brother and all the adult witnesses, including the adult neighbor who had identified McSherry, and again concluded that their descriptions and identifications were based on their actual memories and not on coaching or outside influence.

On May 18, 1988 (the day after McSherry's arrest), the prosecutor authorized that McSherry be

charged on multiple counts. McSherry was later held to answer at the preliminary hearing. At the preliminary hearing, the only witnesses were Candice and the adult neighbor, both of whom identified McSherry as the perpetrator, as well as Candice's mother. In addition, the parties stipulated as to what Candice's examining physician would have said if he had personally testified. No police officers (including Police Officer Norman Turley) testified at the preliminary hearing.

After McSherry was arrested, in the presence of the Naval investigator and Officer Turley, Candice picked McSherry's grandparents' home out of a photo line-up, identifying it as the place McSherry had taken her and provided specific details about the room where she had been raped. Thereafter, the police served a search warrant at McSherry's grandparents' house. The victim's description generally matched a bedroom in the residence.

At McSherry's trial, the Naval investigator who had accompanied Officer Turley during his investigation said that the police did not influence Candice during the photo identifications. The Naval investigator, who was also present at the adult neighbor's photo line-up, also testified at trial that the neighbor was not coached. During the cross-examination of Officer Turley and the Naval investigator, the defense never claimed that Officer Turley manipulated the witnesses or employed unconstitutionally unreliable, improper, or suggestive identification techniques to cause the witnesses to falsely identify McSherry, the

vehicle, or the grandparents' home. McSherry was convicted of Candice's kidnapping and rape. His conviction was affirmed on appeal. *People v. McSherry*, 1992 Cal.App.LEXIS 1460 (December 17, 1992). In December 2001, based on improved DNA testing, McSherry was released from prison.

Statement of Proceedings

McSherry sued Respondents the City of Long Beach, California, the Long Beach Police Department, Police Officer Norman Turley, and Police Sergeant Carthel S. Roberson under 42 U.S.C. § 1983. In October 2003, on the first day scheduled for trial, the district court granted Respondents' Motion for Judgment as a Matter of Law under Fed.R.Civ.P. 50 on the ground of qualified immunity. The Court of Appeals for the Ninth Circuit reversed on procedural grounds. *McSherry v. City of Long Beach*, 423 F.3d 1015 (9th Cir. 2005).

On remand, the district court granted Respondents' motion for summary judgment on the ground of qualified immunity because, as a matter of law, probable cause existed for McSherry's arrest, McSherry's claim of fabricated evidence was not supported by proof, and the prosecutor had conducted an exhaustive independent investigation of the charges against McSherry. Petitioner's Appendix ("P.App.") 60-72.

McSherry appealed the adverse judgment. The Court of Appeals for the Ninth Circuit issued an initial decision that affirmed in part and reversed in

part the judgment. *McSherry v. City of Long Beach*, 560 F.3d 1125 (9th Cir. 2009). P.App. 45-59. In response to Respondents' Petition for Rehearing, the Court of Appeals withdrew its previous decision and issued a new decision that affirmed the judgment below in full. *McSherry v. City of Long Beach*, 584 F.3d 1129 (9th Cir. 2009). P.App. 1-44. The Court of Appeals held that (1) there was probable cause to arrest and charge McSherry (560 F.3d at 1135-36; P.App. 11-15); (2)(a) because the prosecutor filed charges, McSherry cannot sue non-prosecutorial officials, like Officer Turley, where probable cause existed to arrest and charge McSherry, (b) the prosecutor's independent judgment to charge and prosecute McSherry broke the chain of causation between the police officers' alleged unconstitutional actions and McSherry's alleged harm, and (c) the prosecutor's independent judgment was not tainted by the police officers' alleged unconstitutional actions (560 F.3d at 1136-47; P.App. 15-43); and (3) because McSherry's case against the police officers failed, he had no *Monell* claims against the City of Long Beach (560 F.3d at 1147; P.App. 43-44).

McSherry filed a petition for panel rehearing and rehearing en banc. The panel voted to deny the petition for panel rehearing. The full court was advised of the suggestion for rehearing en banc and no judge of the court requested a vote on it. P.App. 73.

REASONS FOR DENYING THE WRIT

I. There is no circuit conflict with the Court of Appeals' decision below, which held there was probable cause to arrest and prosecute McSherry and the prosecutor's decision to prosecute him was based on the prosecutor's independent investigation, untainted by any alleged police misconduct.

McSherry argues that Officer Turley supposedly fabricated evidence and presented it to the prosecutor, who then filed charges against McSherry based on that fabricated evidence. Nonetheless, McSherry continues, both the District Court and the Court of Appeals held the prosecutor's decision to file charges broke the causal chain between Officer Turley's purported wrongdoing and McSherry's alleged damages. Thus, McSherry concludes, this Court should grant certiorari to resolve the claimed conflicts between this case and other decisions of the Courts of Appeals.

McSherry's arguments have no merit. Both the District Court and the Court of Appeals found that, as a matter of law, there was probable cause to arrest and charge McSherry. Moreover, the decision to arrest and charge McSherry was not based on fabricated evidence. And the prosecutor's decision to file charges was based on an exhaustive independent investigation that broke the causal chain between any police action and any damage that McSherry claims to have incurred. Consequently, this case is not contrary to other Courts of Appeals' decisions and this Court has

no need to grant certiorari to resolve a non-existent conflict of decisions in the Courts of Appeals. Sup.Ct.R. 10(a).

A. There was probable cause to arrest and prosecute McSherry.

Probable cause to arrest exists where at the moment the arrest is made the totality of trustworthy circumstances sufficiently warrants an officer of reasonable caution and prudence in believing the arrestee has committed a crime. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Here, probable cause existed to arrest and file charges against McSherry.

First, probable cause was supported by witness identifications. Before his arrest Candice had identified McSherry twice in two photo line-ups and identified the car used to kidnap her once. Candice's brother also identified McSherry and the same car. Thereafter, Candice identified McSherry at a live line-up, at the preliminary hearing, and at trial. An adult neighbor identified McSherry at a photo line-up, at a live line-up, at the preliminary hearing, and at trial.

Second, probable cause was supported by McSherry's extensive history of criminal sexual offenses, including abducting and sexually molesting young girls, for which he had been imprisoned on several occasions and which required his registration as a sex offender.

Third, probable cause was supported by the Sheriff's crime laboratory report, which concluded McSherry was a possible donor of the semen taken from Candice's rape kit.

Finally, McSherry was held to answer at the preliminary hearing, at which no police officers (including Officer Turley) testified. Both Candice and the adult neighbor identified McSherry at the preliminary hearing. A judge's decision to hold a defendant to answer after a preliminary hearing constitutes prima facie (although not conclusive) evidence of probable cause. This prima facie evidence may be overcome by a showing that the judge's decision at the preliminary hearing resulted from fabricated evidence. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004). There was no showing of such tainted evidence at McSherry's preliminary hearing.

B. The determination of probable cause to arrest and prosecute was not based on fabricated evidence or otherwise tainted by alleged police misconduct.

McSherry argues that Officer Turley fabricated evidence and presented it to the prosecutor, who then filed charges against McSherry based on that fabricated evidence. As a matter of undisputed fact, however, probable cause to arrest and prosecute McSherry was ***not*** based on fabricated evidence. There are two types of evidence on which McSherry bases his arguments about fabricated evidence.

First, McSherry argues that, because there were claimed discrepancies between Candice's initial descriptions of the perpetrator and her later photographic identifications of McSherry, Officer Turley must have engaged in improper and suggestive identification procedures.

To begin with, as a matter of law, there is no constitutional right to have child witnesses in a child sexual-abuse investigation interviewed in a particular manner or to have the investigation carried out in a particular way (*Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (en banc)) and police officers need not limit their investigation to the witnesses' initial descriptions and then disregard their later photographic identifications even if there are significant differences between the two (*Hutsell v. Sayre*, 5 F.3d 996, 998, 1004 (6th Cir. 1993)).

In addition, as the Court of Appeals below held, the undisputed facts do not support McSherry's argument. P.App. 13-14. Nurses witnessed Candice's two photographic identifications of McSherry. Nothing in the record from the nurses even suggests coercive or improper identifications. The Naval investigator was also present at Candice's photographic identifications and testified at trial that Officer Turley did not make any effort to influence Candice. Moreover, Candice herself has never claimed that any of her identifications of McSherry were coerced or improperly suggested. Instead, she has continued to maintain that she identified McSherry at the photo line-ups (as well as at the live line-up, at the

preliminary hearing, and at trial) because she in fact believed McSherry was the perpetrator. She has also continued to maintain that her identifications of McSherry were honest and truthful at the time they were made.

As for the identification of McSherry by Candice's brother, there is also no evidence of improper police conduct. The Naval investigator was also present during the brother's photo identification of McSherry.

And as for the adult neighbor's identification of McSherry at a photo line-up, at a live line-up, at the preliminary hearing, and at trial (all of which took place after McSherry was arrested and charged), McSherry argues that it was based on a newspaper picture of McSherry. But there is no evidence that the neighbor even saw the picture much less based her identification of McSherry on any newspaper picture.

Second, McSherry argues that, because there were discrepancies between Candice's initial descriptions of the location of the incident and her later description of the location, which she gave to Officer Turley after McSherry's arrest, Officer Turley fabricated the later description of the location and committed perjury about the description of the incident's location at trial.

As the Court of Appeals below held, however, the alleged fabricated description of the location (involving McSherry's grandparents' house) was ***not*** material to probable cause to arrest and charge McSherry because it was not obtained until ***after*** McSherry was

arrested and charged. P.App. 14. This is because the search warrant of McSherry's grandparents' house was not obtained, and the search based on that warrant did not occur until ***after*** the prosecutor authorized McSherry to be charged and ***after*** McSherry's arrest.

Moreover, neither Officer Turley nor any other police officer testified at McSherry's preliminary hearing (about the location of the incident or anything else). Both Candice and the adult neighbor identified McSherry at the preliminary hearing. Candice described where she was taken in vague terms, although she consistently described the location as a "house," not a "motel." (At McSherry's trial, she testified that Officer Turley had shown her pictures of "houses" and that she picked out the "house" where she had been taken.)

C. The prosecutor's independent judgment to file charges broke the causal chain between the alleged unconstitutional acts and any subsequent alleged injury.

McSherry argues that the prosecutor did not exercise independent judgment in filing charges against McSherry and, consequently, the prosecutor's filing charges did not limit Officer Turley's potential liability. McSherry's argument lacks merit.

As the Court of Appeals comprehensively explained, the prosecutor conducted an extensive and

thorough investigation entirely independent of the police investigation. P.App. 16-42. He reviewed all of the evidence, including the witnesses' identifications, the witnesses' statements, the officers' statements, the physical evidence, the criminal laboratory results, and other corroborating evidence, to ensure there was a case against McSherry, to ensure the reports and line-ups were lawful and not suggestive, and to verify the police information. He personally interviewed Candice several times and was convinced that her descriptions and identifications were based on what she remembered, not on any coaching or outside influence.[1] He did the same for Candice's brother and all the adult witnesses and reached the same conclusion.

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[1] McSherry's primary argument about the prosecutor's supposed lack of an independent investigation is purportedly based on an answer in his "declaration" (actually his deposition) in which, in response to a question about whether he talked to Candice about her original description of the location, he supposedly said, "No . . . " Petition 15, n. 2. As the ellipsis indicates, however, McSherry did not disclose the full answer, which is decidedly different:

> "A No. What I would ask her is what can you tell me about the place. Now if that's asking her about her original description, that would be, I guess, a yes, but I wouldn't tell her details, if that's what you're asking. I'm not sure." P.App. 39.

The prosecutor then described in detail what he did to resolve in his own mind the differences in the descriptions of the location, including asking Candice herself about the differences. P.App. 39-41.

D. The Court of Appeals' decision below is not contrary to other decisions of the Courts of Appeals.

McSherry argues that the Court of Appeals' decision below is contrary to other decisions of the Courts of Appeals. Under the facts of this case as they actually exist (rather than as McSherry erroneously claims they exist) – McSherry was arrested and charged based on probable cause untainted by police misconduct and the prosecutor conducted an exhaustive, independent investigation – the Court of Appeals' decision below is not contrary to other decisions of this Court or the Courts of Appeals.

Unlike this case, most of McSherry's cited cases involved arrests or prosecutions that lacked probable cause:

- *Malley v. Briggs*, 475 U.S. 335, 344-46 (1986) (A police officer was not entitled to qualified immunity where his application to a magistrate to issue an arrest warrant lacked probable cause.).
- *Kerman v. City of New York*, 374 F.3d 93, 106, 120, 126-28 (2nd Cir. 2004) (Where a police officer had no probable cause to commit plaintiff to a mental hospital, the hospital's decision to keep him there did not break the causal chain of liability when the hospital's decision was based on the police officer's recommendation.).

- *Zahrey v. Coffey*, 221 F.3d 342, 345-46, 349-355 (2nd Cir. 2000) (When a prosecutor, while investigating plaintiff, allegedly presented fabricated evidence that he had created to the grand jury, the grand jury's determination of probable cause did not break the causal chain of liability since the grand jury's determination was based on the prosecutor's alleged fabricated evidence.).

- *Buenrostro v. Collazo*, 973 F.2d 39, 41 (1st Cir. 1992) (Plaintiff was unlawfully arrested without an arrest warrant, a search warrant, or exigent circumstances and the magistrate's probable cause determination was based on the alleged false accusations by police officers.).

- *Burke v. McDonald*, 572 F.3d 51, 58-62, 60, n. 9 (1st Cir. 2009) (A magistrate's decision to arraign plaintiff was not a superseding cause cutting off liability because the police had withheld exculpatory information, which negated probable cause, from the prosecutor and the magistrate at the arraignment hearing.).

- *Jones v. City of Chicago*, 856 F.2d 985, 988-91, 993-95 (7th Cir. 1988) (The prosecutor's decision to prosecute was not a superseding cause where the police officers' arrest report was filled with falsehoods, the police withheld exculpatory evidence, the police officers failed

to advise the prosecutor of the false evidence and withheld evidence, and there was no probable cause to prosecute.).

- *Anthony v. Baker*, 767 F.2d 657, 664-67 (10th Cir. 1985) (The grand jury indictment and the preliminary hearing determination of probable cause were tainted by fabricated and withheld evidence.).

- *Smiddy v. Varney*, 665 F.2d 261, 265, 266-67 (9th Cir. 1981), *cert. denied*, 459 U.S. 829 (1982); *Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1986) (Where there is no probable cause to arrest, the police officers' liability is cut off by the superseding cause of the prosecutor's filing charges where the prosecutor exercises independent judgment and where, in connection with the prosecutor's decision to file charges, the police officers have not unduly pressured the prosecutor or presented knowingly false evidence to the prosecutor.).

- *Wagenmann v. Adams*, 829 F.2d 196, 205-09, 211-13 (1st Cir. 1987) (A bail commissioner's decision was not a superseding cause of plaintiff's injuries where plaintiff's arrest and detention lacked probable cause and where the bail commissioner relied entirely on the police officers' representations and did not exercise independent judgment.).

- *Barlow v. Ground*, 943 F.2d 1132, 1135, 1136-1137 (9th Cir. 1991), *cert. denied*,

505 U.S. 1206 (1992) (The prosecutor's decision to file charges was not the proximate cause of plaintiff's damages where there was a genuine issue as to whether the police officers had probable cause to arrest plaintiff and the prosecutor did not exercise independent judgment in deciding to file charges but instead relied only on the police officers' reports, which omitted crucial information.).

- *Borunda v. Richmond*, 885 F.2d 1384, 1390, 1391 (9th Cir. 1988) (The prosecutor's decision to file charges was not the proximate cause of plaintiff's damages where there was no probable cause to arrest plaintiff, the prosecutor relied only on the police officers' reports, and the police officers made misrepresentations to the prosecutor.).

- *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1072-74 (2nd Cir. 1997) (Relying on cases holding that the causal chain is not broken by a judge's issuance of an arrest warrant where the application for the arrest warrant lacked probable cause, the court held that the causal chain was not broken by a judge's order adopting a probation department's recommendation of an unconstitutional religious therapy program where the court routinely adopted the probation department's recommendations without

making an independent investigation or decision.).

One of McSherry's cited cases involved an arrest and prosecution where probable cause was present. *Hand v. Gary*, 838 F.2d 1420, 1426-28 (5th Cir. 1988) (The causal chain was broken by a criminal indictment where there was probable cause to arrest and prosecute and the decision to do so was not tainted by withheld information.).

Three of McSherry's cited cases involved the erroneous admission of unconstitutionally obtained evidence or other errors at a trial or other judicial hearing. In *Egervary v. Young*, 366 F.3d 238, 246-51 (3rd Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005), federal officials, who had successfully sought an improper ex parte order, without notice, against a father in connection with an international child custody dispute were held to be not liable because the judge's erroneous decision to enter the order was a superseding cause to the officials' acts. Similarly, in *Duncan v. Nelson*, 466 F.2d 939, 943-45 (7th Cir. 1972), the trial court's improper decision to admit an unlawful confession obtained by police officers into evidence was a superseding cause of all damages based on plaintiff's conviction and incarceration because it was the trial court's responsibility to determine applicable law and procedures. In *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005), *cert. denied*, 546 U.S. 1090 (2006), however, the prosecutor's use of an improper statement obtained by police officers into evidence was not a superseding

cause and did not preclude a claim against the police officer. But *McKinley* did not consider the issue decided in *Egervary* and *Duncan* – that the trial judge's improper decision to conduct a hearing violating due process or to admit the improperly obtained statement was a superseding cause, cutting off the police officer's liability.[2]

Two of McSherry's cases involved circumstances that do not neatly fall within the categories mentioned above. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 557-58, 560-61 (1st Cir. 1989) (Where four police officers participated in unwarranted shooting toward plaintiff but only one bullet hit him, the other officers were not rendered immune from liability on the ground that the acts of the officer whose bullet actually injured plaintiff was a superseding cause of the injury since the other officers also participated in the unlawful acts leading to plaintiff's injury, which was the result of a team effort.); *Lanier v. Sallas*, 777 F.2d 321, 322-25 (5th Cir. 1985) (Where plaintiff was committed to a mental hospital based on false certifica ions by court-appointed doctors, who had never actually seen plaintiff, the proximate cause of the commitment was the judge's reliance on the false statements in the certifications, not the fact that the

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[2] To the extent that there is circuit conflict on this issue, this case is not the appropriate vehicle to resolve that conflict because the Court of Appeals below did not consider what effect a trial court's improper decision may have as a superseding cause, cutting off the police officers' liability.

judge relied on certifications filed after the statutorily mandated time.).

Finally, one of McSherry's cited cases held that it did not have to decide the police officers' argument that the prosecutor's and grand jury's decisions to prosecute and indict plaintiff were superseding causes of plaintiff's damages arising out of an unlawful search and seizure because plaintiff was not entitled to any damages after his arraignment. *Hector v. Watt*, 235 F.3d 154, 155-61 (3rd Cir. 2001).

Many of these cases are irrelevant to any issue here. None of them is contrary to the decision of the Court of Appeals below – McSherry has no claim where there was probable cause to arrest and prosecute him and the prosecutor's decision to prosecute him was based on the prosecutor's independent investigation, untainted by any alleged police misconduct.

Moreover, the decision of the Court of Appeals below is consistent with this Court's most recent decision on the causation issue. *Hartman v. Moore*, 547 U.S. 250 (2006). In *Hartman*, this Court held that a plaintiff has no claim against a person for inducing a prosecutor to file criminal charges against plaintiff in retaliation for plaintiff's exercising First Amendment rights unless plaintiff has alleged and proved that the criminal charges lacked probable cause. *Id.* at 259-65. If probable cause exists, it is irrelevant how much retaliatory animus the person who induced the prosecution may have had or whether the

prosecutor filed the charges as a rubber stamp for the police or others or had other improper motives for filing the charges. *Id.* at 264.

The decision of the Court of Appeals below is also consistent with other decisions of the Courts of Appeals after *Hartman*. In *Beck v. City of Upland*, 527 F.3d 853, 862 (9th Cir. 2008) – a decision that the Court of Appeals below relied upon (P.App. 15-16) but which McSherry does not even mention – the Court held that in ***any*** constitutional tort case, including Fourth Amendment-based cases, in which a prosecutor has instigated a prosecution, a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution ***must*** show the absence of probable cause. *Id.* at 865.

Other decisions of the Courts of Appeals have applied *Hartman* to require proof of probable cause in order to proceed in constitutional tort claims. *McBeth v. Himes*, 598 F.3d 708, 712-20 (10th Cir. 2010) (Plaintiff had no claim against a police officer for acting with retaliatory animus, even where there was no claim of retaliatory prosecution, because there was no proximate causation between the police officer's acts and plaintiff's alleged damages where plaintiff did not claim lack of probable cause.); *Williams v. City of Carl Junction*, 480 F.3d 871, 875-77 (8th Cir. 2007) (Plaintiff had no claim for the filing of criminal citations in alleged retaliation for exercising First Amendment rights where intervening acts by the prosecutor were not present because there was probable cause for filing the citations.); *Barnes v. Wright*,

449 F.3d 709, 715-20 (6th Cir. 2006) (The presence of probable cause barred malicious-prosecution and false-arrest claims even where intervening acts by a prosecutor were not present.).[3]

The decision of the Court of Appeals below is also consistent with other decisions of the Courts of Appeals before *Hartman* holding that the presence of probable cause bars claims like McSherry's. *See, e.g.*, *Kerr v. Lyford*, 171 F.3d 330, 340-41 (5th Cir. 1999) (Claims against non-prosecutor defendants were barred because the prosecutor's intervening actions severed their responsibility for plaintiffs' allegedly unreasonable seizure, false arrest, and false imprisonment and because, as a matter of law, probable cause to prosecute remained when the allegedly tainted evidence was not considered.); *Taylor v. Gregg*, 36 F.3d 453, 456-57 (5th Cir. 1994) (Causation in plaintiff's claim against police officers for false arrest was broken by plaintiff's appearance before a

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[3] The Ninth Circuit, taking the admittedly minority view, has held that proving the lack of probable cause is not required in an "ordinary" retaliation claim, as opposed to a retaliatory prosecution claim, particularly where there was barely enough evidence of probable cause and strong evidence of retaliatory motive. *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-35 (9th Cir. 2006). The Ninth Circuit, however, subsequently recognized that, while the presence of probable cause is not "dispositive," it undoubtedly has "high probative force." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900-01 (9th Cir. 2008), quoting *Hartman*, 547 U.S. at 265. This case, however, is not the appropriate vehicle to resolve any conflicts of decisions in "ordinary" retaliation cases since this case is not such a case.

magistrate and the grand jury indictment where no evidence showed that the allegedly false information was relied upon by either the magistrate or the grand jury.).

Because there is no circuit conflict with the Court of Appeals' decision below, the Petition should be denied.

II. There is no circuit conflict with the Court of Appeals' decision below, which held that police officers' trial testimony is absolutely privileged where the victim, not the police officers, was the complaining witness.

McSherry argues that, while police officers are ordinarily entitled to absolute immunity for trial testimony, even if perjurious, there is an exception for complaining witnesses and the Court of Appeals below erred in finding that Officer Turley was not the complaining witness.

McSherry's argument has no merit. As the Court of Appeals below properly held, Candice, not Officer Turley, was the complaining witness. In addition, the complaining-witness exception arises only in the malicious-prosecution aspect of a Section 1983 claim. The complaining-witness exception becomes irrelevant where, as here, there was probable cause to arrest and prosecute because the presence of probable cause independently bars any malicious-prosecution-type claim under Section 1983. McSherry has not

shown that the Court of Appeals' decision below is contrary to other Courts of Appeals' decisions. This Court has no need to grant certiorari to resolve a non-existent conflict of decisions in the Courts of Appeals. Sup.Ct.R. 10(a).

Police officers, like all witnesses, are absolutely immune from liability under Section 1983 for alleged perjured or fabricated trial testimony. *Briscoe v. LaHue*, 460 U.S. 325 (1983). "Subjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." *Id.* at 343.

McSherry argues that Officer Turley's trial testimony is not absolutely privileged because Officer Turley was the complaining witness. As the Court of Appeals below held, however, Officer Turley was not the complaining witness. P.App. 42-43. Instead, it was the victim, Candice, who identified McSherry as the perpetrator five times – two photo line-ups, a live line-up, the preliminary hearing, and the trial. Officer Turley did not even testify at the preliminary hearing, where McSherry was held to answer for trial.[4]

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[4] There is a question of whether there is in fact a complaining-witness exception to the absolute immunity usually granted to trial witnesses. The 11th Circuit and the 3rd Circuit have rejected creating a complaining-witness exception to absolute

(Continued on following page)

In McSherry's cited cases, unlike this case, there was no complaining victim. Instead, the alleged crimes took place in the police officers' presence or were directed against them. *Harris v. Roderick*, 126 F.3d 1189, 1192-94, 1198-99 (9th Cir. 1997) (alleged perjury about plaintiff's conduct connected with police officers' attempted arrest of another person); *Enlow v. Tishomingo County*, 962 F.2d 501 (5th Cir. 1992) (alleged perjury about plaintiff's conduct connected with a police gambling raid); *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988) (alleged perjury about police officers' observing plaintiff selling drugs). Or a crime was determined to have been committed as a result of a police investigation, not a complaining victim. *Anthony v. Baker*, 955 F.2d 1395, 1396-1402 (10th Cir. 1992) (alleged perjury concerning extensive arson investigation that defendant headed; remand to resolve the complaining-witness issue). Or the police officer swore to the charging document's stated facts under penalty of perjury. *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997). Or some combination of these situations. *Malley v. Briggs*, 475 U.S. 335, 339-45 (1986) (police officer's complaint and affidavit based

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immunity while the 9th Circuit and the 2nd Circuit have recognized such an exception. *See Rehberg v. Paulk*, 598 F.3d 1268, 1277-79 (11th Cir. 2010). This case, however, is not the appropriate vehicle to resolve any conflict that exists here since Officer Turley was not the complaining witness and since the concept of a complaining witness is irrelevant where, as here, there was probable cause to arrest and prosecute McSherry.

on personal knowledge from wiretap).[5] None of those circumstances exists here.

McSherry has cited no decision supporting his expansive definition of "complaining witness." His definition is so broad that it would apply to virtually every police officer conducting a criminal investigation and nullify the absolute immunity of police officers testifying at trial recognized by *Briscoe*.

Moreover, the "complaining witness" issue is irrelevant here because probable cause existed to arrest and prosecute McSherry. The "complaining witness" issue arises only in the malicious-prosecution aspect of a Section 1983 claim. In this context, all witnesses are absolutely immune from liability except for the complaining witness, who remains potentially liable for malicious prosecution. *Malley*, 475 U.S. at 340-41; *Harris*, 126 F.3d at 1198-99. But if the prosecution was based on probable cause, the malicious-prosecution-type claim independently fails because the lack of probable cause is a necessary element to such a claim. *Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006); *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). This means that, if the prosecution was based on probable cause, plaintiff has no malicious-prosecution claim under Section

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[5] McSherry also cities *Kulas v. Flores*, 255 F.3d 780 (9th Cir. 2001), *cert. denied*, 535 U.S. 995 (2002). But there the police officer was held not to be a complaining witness, there was no evidence to the contrary, and the police officer was thus entitled to absolute immunity. *Id.* at 783, 784.

1983 against a complaining witness. *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 & n. 6 (9th Cir. 2009). Here, probable cause to arrest and prosecute McSherry existed. Officer Turley's trial testimony is thus absolutely privileged, regardless of whether he was the complaining witness.

Because there is no circuit conflict with the Court of Appeals' decision below, the Petition should be denied.

III. There is no circuit conflict with the Court of Appeals' decision below, which held that *Hartman v. Moore*, requiring a plaintiff to prove lack of probable cause in a retaliatory-prosecution case, applies to other constitutional torts.

McSherry argues that this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), requiring a plaintiff to prove lack of probable cause in a retaliatory-prosecution case, should not be applied to other constitutional torts and that the Court of Appeals' decision below, which applied *Hartman* in a non-retaliatory-prosecution case, conflicts with other decisions of the Courts of Appeals.

McSherry's argument has no merit. McSherry has not shown that the Court of Appeals' decision below is contrary to other Courts of Appeals' decisions. This Court has no need to grant certiorari to resolve a non-existent conflict of decisions in the Courts of Appeals. Sup.Ct.R. 10.

With one exception, every case that McSherry cites that supposedly creates a conflict with the Court of Appeals' decision below predates this Court's 2006 decision in *Hartman*. The Sixth Circuit in *Greene v. Barber*, 310 F.3d 889, 895, 896-97 (6th Cir. 2002), did hold that the existence of probable cause is not determinative if a plaintiff is arrested in retaliation for having engaged in constitutionally protected speech. The Sixth Circuit, however, subsequently recognized that, since *Hartman*, *Greene* no longer states good law. *Leonard v. Robinson*, 477 F.3d 347, 355 (6th Cir. 2007) ("*Hartman*, therefore, calls into question our cases holding that 'probable cause is not determinative of the [First Amendment] constitutional question.' *See Greene*, 310 F.3d at 895.") (brackets in original); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) ("[I]t is clear that the *Hartman* rule modifies our holdings in *McCurdy* and *Greene* and applies in this case. As discussed above with regard to Barnes's malicious-prosecution claim, the defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case. Barnes's First Amendment retaliation claim accordingly fails as a matter of law.") (brackets in original).

McSherry's other pre-*Hartman* cases do not in fact hold that the existence of probable cause is determinative ***only*** if a plaintiff was arrested in retaliation for having engaged in constitutionally protected speech. *DeLoach v. Bevers*, 922 F.2d 618, 620-21 (10th Cir. 1990) (Plaintiff's claim of retaliatory prosecution against a police officer was not

shielded because of the intervening acts of the district attorney's decision to prosecute, the magistrate's decision to issue an arrest warrant, and the judge's decision at the preliminary hearing where the officer mischaracterized the evidence and concealed the exculpatory evidence.); *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002) (Probable cause to arrest plaintiff defeated her retaliatory-arrest claim.); *Keenan v. Tejeda*, 290 F.3d 252, 260-61 (5th Cir. 2002) (Plaintiff's claim for retaliatory arrest and prosecution were not barred as a matter of law where there were disputed facts as to whether the arrest and prosecution lacked probable cause.); *Curley v. Village of Suffern*, 268 F.3d 65, 72-73 (2nd Cir. 2001) (Probable cause to arrest plaintiff defeated his retaliatory-arrest claim.); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) (Probable cause to arrest plaintiff defeated his retaliatory-arrest claim.).

The only post-*Hartman* case that McSherry cites is *Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-35 (9th Cir. 2006). There, the Ninth Circuit held that proving the lack of probable cause is not required in an "ordinary" retaliation claim, as opposed to a retaliatory-prosecution claim, particularly where there was barely enough evidence of probable cause and strong evidence of retaliatory motive. The Ninth Circuit, however, subsequently acknowledged that *Skoog* represents a minority view and that, while the presence of probable cause is not "dispositive," it

undoubtedly has "high probative force." *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 900-01 (9th Cir. 2008), quoting *Hartman*, 547 U.S. at 265.

Other Court of Appeals' decisions have applied *Hartman* in cases other than retaliatory-prosecution cases. *Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008) (In ***any*** constitutional tort case, including Fourth Amendment-based cases, in which a prosecutor has instigated a prosecution a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution ***must*** show the absence of probable cause); *McBeth v. Himes*, 598 F.3d 708, 712-20 (10th Cir. 2010) (Plaintiff had no claim against a police officer for acting with retaliatory animus, even where there was no claim of retaliatory prosecution, because there was no proximate causation between the police officer's acts and plaintiff's alleged damages where plaintiff did not claim lack of probable cause.); *Williams v. City of Carl Junction*, 480 F.3d 871, 875-77 (8th Cir. 2007) (Plaintiff had no claim for the filing of criminal citations in alleged retaliation for exercising First Amendment rights where intervening acts by the prosecutor were not present because there was probable cause for filing the citations.); *Barnes v. Wright*, 449 F.3d 709, 715-20 (6th Cir. 2006) (The presence of probable cause barred malicious-prosecution and false-arrest claims even where intervening acts by a prosecutor were not present.).

McSherry does not cite any Court of Appeals' decision holding that, while lack of probable cause ***must*** be proved in First Amendment cases that involve a prosecutor, lack of probable cause is ***not*** required in other constitutional tort cases that involve a prosecutor. Nor does McSherry even attempt to articulate why there should be a distinction between these two kinds of cases.

Beck held that, in the context of a Fourth Amendment case, there is in fact no distinction between these kinds of cases:

> "We see no reason to limit *Hartman*'s probable cause requirement solely to First Amendment retaliatory arrest and prosecution cases. Rather, its logic extends to Fourth Amendment false arrest cases like Beck's, at least to the extent that the plaintiff must prove the absence of probable cause to rebut the presumption of independent prosecutorial judgment, when a prosecutor's actions are interposed between the actions of investigating officials and the arrest. Ordinarily, however, the plaintiff bears the burden of proving the absence of probable cause anyway in a Fourth Amendment false arrest case. Proving lack of probable cause is usually essential to demonstrating that the plaintiff's Fourth Amendment rights were violated. As a practical matter, consequently, *Hartman* will rarely add to the plaintiff's ultimate burden in a § 1983 false arrest case." 527 F.3d at 864.

Beck concluded that a plaintiff must prove the lack of probable cause in all constitutional tort cases, not just those under the Fourth Amendment. "[I]n ***any*** constitutional tort case, including Fourth Amendment-based cases, in which a prosecutor has instigated a prosecution, it is necessary, if not sufficient, that a plaintiff seeking to sue nonprosecutorial officials alleged to be responsible post-complaint for the arrest or prosecution show the absence of probable cause." 527 F.3d at 865.

Because there is no circuit conflict with the Court of Appeals' decision below, the Petition should be denied.

CONCLUSION

For all the reasons stated above, McSherry's Petition should be denied.

Respectfully submitted,

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